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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 597

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR RESPONDENT UNITED SHOE MACHINERY CORPORATION

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Opinions Below, Jurisdiction, Statute Involved

These matters are set forth in the Government brief pp. 1-3.

Question Presented

Where a 1953 decree (affirmed by this Court) finding monopolization and prescribing remedies has been fully complied with by the defendant, and substantial and continuing progress is being achieved both in reducing defendant's market occupancy and in introducing new competition in the manner and at the rate intended by the trial court, was it error for the trial court to decline a Government request,

which had been rejected in 1953, for additional and more drastic relief?

Additional Statement of Fact

The following additions to the Statement in the Government brief pp. 3-6 are necessary for proper understanding of this appeal:

A. 1953 Proceedings

1. The decree which this Court affirmed, 347 US 521, was entered after a trial of "prodigious length" which occupied 121 hearing days, covered 14,194 pages of transcript and produced 26,474 pages of exhibits in addition to 150,000 pages of United machine reports, 6,000 copies of patents, and 2,122 pages of depositions. The extensive findings, opinion and decree of the trial judge at pp. 297-354 of 110 F. Supp. were extolled in the Government brief on United's appeal to this Court (No. 394 October Term 1953, pp. 154, 156) with phrases like—

> "the careful consideration which underlies the provisions for relief" and
>
> "the logic, the clarity and the meticulousness of the opinion on remedy, and of the decree itself".

2. The trial court found that by far the most important means by which United achieved its 1953 share of the market and its then market power was that set of transactions in 1899 by which it brought under one corporate control the business of six constituent companies (110 F. Supp. at 307). As held by the trial judge in the decision which this Court affirmed, those transactions had already been adjudicated in favor of United in cases which came to this Court. *United States* v. *Winslow* 227 US

202; *United States* v. *United Shoe Machinery Co.* 247 US 32. The decree under review concerned itself exclusively with how United's market power had been maintained and exercised since those adjudications (110 F. Supp. at 307).

3. The 1953 findings contained a careful summary of shoe-making processes in force at that period, with the description of the 18 principal processes most of which involved distinctive operations in lasting or sole-attaching or both (110 F. Supp. at 300-1). The court observed that shoes for every known use are manufactured by more than one principal manufacturing process, and that each shoe manufacturer may vary the operations used in the various processes according to his preferences, the materials used, the type of shoe and many other variables (110 F. Supp. at 301). The court found that shoe manufacture is a long chain of detailed operations, each preparatory to a succeeding operation and often requiring individual correction or adjustment (*ibid.*). The process of shoe manufacture is different from the usual fabrication and assembly process current in many other types of manufacturing industry (*ibid.*).

There is no standard set or number of shoe machines which every shoe manufacturer must have; he not only has personal choice as to which process, processes or subprocesses he will use, but he has wide choice as to whether a particular operation will be performed by hand or by one or another type of machine (110 F. Supp. at 301-2). The concept of "shoe machinery" includes complicated relationships between different types of machines: some are parallel to other types; some are sequential to other types; occasionally a pair of types which are competitive when used in two different shoe manufacturing processes, are complementary when used in a single shoe manufacturing process (*id.* at 302). The court also portrayed the complexity of various

machine types, the engineering skill required in the design, the interdependence of machine operations in each factory, and the excellent performance of the United machines (*id.* at 302, 331, 339-40). Thus, the peculiar technology or technologies of shoe manufacture affect the nature of the market in each shoe machinery manufacturer's attempt to place his equipment.

The findings enumerated the 18 principal machine types and the 12 subordinate types as of 1947, with the percentages of United occupancy in each as indicated by United's internal machine reports and depositions on a random sample (*id.* at 304-6). It was from these data that the court in 1953 concluded United to be the supplier of 75% to 95% of the total current demand for shoe machinery exclusive of dry thread sewing machinery (*id.* at 307). This it found to be somewhat less than the share United was supplying in 1915 (*id.* at 339).

4. The trial court found the three principal sources of United's power in 1953 to have been the original constitution of the company, the superiority of its products and services, and the leasing system (*id.* at 344). It held the first two of these plainly beyond reproach, pointing out that the original constitution of the company was judicially approved by this Court in 247 US 32 and must be regarded as protected by the doctrine of *res judicata* (*ibid.*). In the decision which this Court affirmed the trial court also held that under the rule of the *Aluminum* case, 148 F. 2d at 430, such part of United's market power as rested on the high quality of its products, its understanding of shoe manufacture, its efficient design and improvement of machines, and its efficient repair service, was also beyond legal criticism (110 F. Supp. at 344). The trial court also found that United's leasing practices served the purpose of establishing ease of entry in the shoe manufacturing field, so that many

of the larger manufacturers, who collectively accounted for 40% of domestic shoe production in 1953, started in a small way and expanded under the leasing system (110 F. Supp. at 323). However, the court held certain aspects of the leasing system to have been illegal. The injunctive and remedial actions of the court were directed to the removal of restrictions from the leases, imposing a requirement of sale, instituting separate charges for service, prohibiting purchases in the second-hand market, opening patents to license, and terminating United's manufacture and distribution of tacks, nails and eyelets.

5. In setting forth the remedies which it deemed necessary to correct the conditions complained of in the original case, the Government requested not only the injunctive relief above described but in addition the dissolution of United into three machinery companies, which it claimed to be "a practical necessity for the emergence of competitive conditions in the shoe machinery industry" (Brief of United States on Relief, p. 46). The trial judge considered this proposal and rejected it as unrealistic and impracticable (110 F. Supp. at 348). He pointed out that United conducted all machine manufacture at a single plant in Beverly, Mass., with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force; and that no means existed of dividing these facilities or converting them into three factories. He explained the principle of relief as an elimination of lease restrictions and the encouragement of a second-hand market through the requirement of alternative sale. From the second-hand market the court expected a type of substitute competition to arise which would "gradually weaken" United's market power (*id.* at 350). The second-hand market and elimination of the lease restrictions were expected, in combination, to "gradually diminish the magnetic hold now exercised by

. . . the partnership features of the leasing system" (*ibid.*), so that competition might come in as United's relationships with customers grew feebler.

6. The relief selected was carefully designed to fit the nature of the shoe machinery market (excluding dry thread sewing machinery), which, the court found, had special characteristics distinguishing it from other markets (*id.* at 301-3). The court's expectations that the workings of the shoe machinery market would accomplish the purposes of the relief provided were based upon its description of shoe-making processes and shoe manufacture set forth at p. 3 above.

B. 1967 Proceedings

In his review of the operation of the decree pursuant to paragraph 18, Judge Wyzanski, the original trial judge, gave full scope to the parties to show the condition of the shoe machinery business as of January 1 1965, designated as C-Day.

1. His pre-trial order (attached to the Government brief) followed the framework of the earlier decision, was keyed to the essential findings of the original decision, and invited evidence upon the "*changes* during the last decade in demands and requirements of the domestic shoe manufacturing industry for machines for shoe production; and *changes* in the number and types of United and of non-United equipment available" (emphasis supplied). This order provided that no program of divestiture need be offered until a conclusive showing had been made "of the failure of the decree, as now operative, to have effected the goals originally contemplated".

2. Pursuant to the court's direction, numerous pre-trial proceedings took place, including conferences and copious

correspondence between the parties with a view to the stipulation of the evidence so far as possible. Seven written stipulations of evidentiary material were entered into. In addition the testimony of 29 witnesses was taken.

3. The hearings on this review were extensive and included economic evidence on changed competitive conditions in the industry, including machine distribution, manufacturing processes, market share, ease of entry, and new technical developments. On this survey of ten years' operation of the decree, the district judge who had acquired unique familiarity with the shoe machinery industry, concluded that the decree affirmed by this Court was operating in the manner originally intended, and declined to modify it.

C. Findings with Respect to Operation of Decree

As to the issue before him under paragraph 18 of the decree, with respect to its effect in establishing workable competition, Judge Wyzanski pointed out that this language when read against the original opinion called for information as to how successful the decree had been "in gradually eroding United's 1953 power to monopolize the market." 266 F. Supp. at 330, A. 74 (cf. ". . . gradually weaken the prohibited market power which it now exercises", 110 F. Supp. at 350). He said the object of the decree was "not to restore so-called workable competition but to move toward establishing it" in the ten-year period (*ibid.*).

After summarizing the facts of which the court was aware in 1953, Judge Wyzanski compressed the extensive evidence of what the decree had accomplished, the dynamics of the 1963-4 shoe machinery market, customers' freedom of choice, and competitors' freedom of movement, into 16 findings detailed at pp. 331-4 of 266 F. Supp., A. 76-81. Salient in the findings are the following points:

1. United complied fully with the decree. (Finding 1)

2. Its share of the shoe machinery market has declined in the ten years from about 85% to about 62% (by a revenue measure, including rentals and unit charges received on machines shipped in earlier years) or 48% (by a value of actual shipments measure). (Findings 2, 13) [This share, stated as of 1963, has since dwindled and is still dwindling.]

3. The shrinkage of United's market share during the 1953-1963 period by between 25% and 40% is confirmed by many factors. These include the decline of United's shoe machinery revenues by one-quarter as against the doubling of gross revenues of its 12 most important domestic competitors; the reduction by almost half of the earnings before taxes of United's Shoe Industry Group, after elimination of proceeds from conversion sales;[1] the decline in United's employment by 30% in its factory and 40% in its service branch; and the decrease of shoe machinery shipped to 51.7% in 1963. (Finding 5)

4. At the end of the period there were about 126 suppliers of new shoe machines, and the pace of entry into the market regularly increased in each three-year period after the decree: from 11 to 19 to 26, or a total of 56 companies. New entrants can participate effectively in one or several parts of the industry without participating in other parts. (Finding 10)

5. The number of United shoe machines on lease in domestic shoe factories has fallen from 91,000 to 26,000, so that in 1963 only 17% of the machines in domestic shoe factories were on lease from United. While approximately 90 per cent. of the machines shipped by United in the post-

[1]The Government appears to complain that the court's revenue figures excluded United's income from conversion sales (br. 12 n. 7). But if United had included conversion sales for the ten-year period, United's total revenue would have dropped even more—from $46,098,000 to $25,831,000—a 44% decrease (Ex. P-68, admitted Tr. 536).

decree decade have been on lease, a substantial number of these are ultimately bought by shoe factories. Most shoe factories initially lease rather than buy machines of the expensive types, not because the lease terms are not commercially related to sale terms, but because shoe-makers prefer to have the right easily to return expensive machines and because they lack either the financial ability or the inclination to invest substantial capital in shoe machinery. The continuation of the pattern of leasing expensive machines is a response to the demand from the shoe-making market which has 785 enterprises, many of them of modest resources. Without leases many of them could not continue in business. (Finding 6)

6. United is subject to constant full and free competition from competitors' machines in toe-lasting, side-lasting, sole-attaching, pulling over, and bottoming. That kind of competition reveals that several of the 18 sub-classifications of "major machines" are in competition with one another and that percentage calculations based upon each separate classification are misleading unless machines which are in competition with one another are grouped together, thus reflecting the true character of the shoe machinery market. (Finding 11)

7. In domestic shoe factories 187 different operations are employed for the manufacture of shoes, but in only 45 was United the sole source of supply. In almost all of those the total industry demand is less than six machines a year, the operation is not economically attractive, and the operation is competitive with other alternative operations for which machines are available from sources other than United. (Finding 15)

8. For the few sectors of the shoe machinery market in which United in 1963 was without significant competi-

tion, United's position in those sectors was not the result of any exclusionary power of United and did not make competition unworkable. (Finding 14)

9. Whatever dominance United continues to enjoy in sub-markets is due not to restraints of trade, but to normal economic forces including the merits of its products and the economic unattractiveness of the sub-market looked at alone. In some sectors of the market competition is already flourishing. In sectors where it is not flourishing all artificial barriers have disappeared. United has not created new barriers. United follows no practice and enjoys no significant advantage which could preclude or restrain competition by an enterprise of a size comparable with leading machinery companies in other industries. (Findings 15, 16)

10. The decree has tended to open the market by promoting the return of United machines by customers. The total returns to United of so-called major machines exceeded the total shipments by more than one-third during 1955-64. This trend promotes competition by making the shoe factory a more frequent customer for shoe machinery. (Finding 7)

11. In the decade 1953-63 shoe factories purchased over 53,000 machines which they had previously leased from United, such purchases continuing in reduced numbers to the very end of the period. Each purchase reduces United's power by making the machine available for the second-hand market. (Finding 8)

12. United has faced important competition from an active second-hand market, largely of its own machines. In 1963 that market sold about $3 million in machines, which stands comparison with United's revenues of $22 million from leases and $1.6 million from sales. The second-hand market is sufficiently vigorous so that it is not unusual now

for shoe factories to start in business utilizing many machines originally of United manufacture, without obtaining a single machine from United. (Finding 9)

13. The unanimous and representative testimony of shoe-makers is that there now exists in the shoe machinery market sufficient competition to allow the shoe manufacturers to select machinery as they wish on the merits of the machines available and in accordance with the processes they select to meet the various style changes in the consumers' market. (Finding 11)

14. In 1953 United had and exercised power to exclude competitors from every significant classification of shoe machinery. In contrast, by 1963 it was not exercising and was incapable of exercising exclusionary power over the entire market. This is shown not merely by its reduced share of the market, by its altered leases, and by the growth of competition from domestic manufacturers, importers, and second-hand machinery but by the following miscellaneous indicia. The seven older techniques of manufacture in which United once offered over 90% of the machine types, had by 1963 steadily declined to one-third of the relevant sub-market, and in the newer techniques United does not hold a commanding position. Hence United cannot control competition in those areas. Of the shoe machines in shoe factories, only 51% had been shipped by United and only 17% were covered by United leases. Of the shoe machines shipped in 1963 United's share by value may be as little as 48% and certainly is not much over 50%. (Findings 12, 13)

15. The shoe manufacturers' associations, representing substantially all the shoe manufacturers "who are among the chief intended beneficiaries of this Court's decree and who have had an unequalled opportunity daily to observe its effect in the last decade", are content with the operation

of the decree and do not want it modified (266 F. Supp. at 335, A. 83).

From its findings the court concluded that the decree "has operated in the manner and with the effect intended. It has put in motion forces which, aided by new technology, have eroded United's power and already dissipated much of the effect of United's monopolization." (*id.* at 334, A. 81). The court felt that the Government's complaint was not at any failure of the decree to work as expected, but at its failure *while working in the foreseeable and intended way* to accomplish the dissolution which the Government had originally prayed for and the court had rejected in 1953 (*id.* at 334, A. 82).

D. Economic Evidence.

The court's findings are not attacked by the Government as erroneous in any particular,[2] and it is therefore unnecessary to detail the abundant evidence which the court had for its decision. In view however of the Government's insistence that "monopoly power" still exists, we call attention to two classes of evidence showing the competition which has come into the market. The first is what Judge Wyzanski called "the unanimous and representative testimony of shoe makers"—uncontested by the Government—as to their freedom of choice and the supply of competitive machinery (266 F. Supp. at 332, A. 79), contained in a dozen affidavits[3] and in the testimony in open court of James H. Cheek, President of the Manufacturing Division of the important company Genesco Inc. and a member of the Technical Committee of the National Footwear Manu-

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[2]The Government does not claim that any finding is clearly erroneous, even though it quarrels with the interpretation of certain findings (pp. 26-8, 31-3) or the evaluation of some of the evidence (pp. 12 fn. 7, 15 fn. 11).

[3]Ex. D-24, D-25, D-26, D-29, D-31, D-32, D-33, D-35, D-36, D-38, D-39, D-41, D-43—all admitted Tr. 609.

facturers Association (Tr. 1352-1405). The second consisted in the testimony of Dr. Bertrand Fox, Professor of Business Administration and Director of Research of the Harvard Business School, whose extensive qualifications are set forth in Ex. D-86 admitted Tr. 1432, A. 36.

Professor Fox made an analysis of the dynamics of the shoe machinery industry in the ten-year period on the basis of an elaborate study of machine operations performed by United and competitive machinery. The Fox analysis focused on what he called "the single most significant requirement for effective or workable competition . . . the existence of realistic alternatives for buyers of a product so that they, by switching among sellers, can exercise pressure on each seller toward efficiency, price reductions, profits, improvements in products, improvements in processes" (A. 38). It is from that vantage point that he undertook his analysis of the industry. He did not approach the case by measuring industry-wide market shares, or the financial strength of competitors, or how many machines of each type they have marketed.[4] As pointed out in the footnote, the heterogeneity of the shoe machinery industry made those measures less satisfactory and less fruitful than the analytical method that he devised and used.

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[4]Indeed, when asked on cross-examination whether where there is one large company many times larger than any competitor, that would indicate that the company had market power, Dr. Fox emphatically stated: "That amount of information by itself for this business would not lead me inevitably to that finding or that result. This is a business, and I cannot emphasize this strongly enough, the way I look at it, that in essence almost consists of 187 different businesses, and the real competition of substituting one machine for another is in these cells one after another." (A. 70) And in response to a subsequent question by the court, Dr. Fox stated: "one cannot treat this as one market for a homogeneous product. This is not like an aluminum market or a wheat market. It is this difference, I think, which is extremely important for this particular industry, and it is also terribly difficult to get appropriate measures for it." (A. 70)

This method was to measure the market dynamics, the processes or direction of change, pursuant to the pretrial order, which speaks not of market shares or values but rather of "changes during the last decade in demands and requirements of the domestic shoe manufacturing industry for machines for shoe production; and changes in the number and types of United and non-United equipment available." At the threshold, he recognized the key characteristics of the shoe industry and the shoe machinery industry, summarized at pp. 3-4 above. He took account of the large number of operations required for shoe manufacture, the wide variety of shoes being produced, the number of different technologies employed, the small number of machines per operation in most shoe factories, and the shifts in types of shoes produced and technology employed (Tr. 1174-77, A. 44). There is an almost unlimited variety of ways by which entry is possible, in view of the very large number of separate shoe-making operations in which a machine can be offered (*ibid.*).

Against that background, the purposes of the economic studies were to ascertain the nature and extent of the alternatives available to manufacturers in the selection of shoe machinery, to identify the changes in such alternatives during the decade since the decree, and to assess the emerging patterns (A. 38).

Dr. Fox's evidence examined the flow of shoe production through each stage of manufacture, the alternative processes and sub-processes available at various stages, and the machines of United and competitive manufacture available for the 187 different operations. He devised standards to measure the economic attractiveness of the various operations. He examined the dates and volume of new entries into the market, both foreign and domestic, and analyzed the machine types produced by the 126 different suppliers.

On the basis of these studies he reached the following conclusions:

1. The realistic alternatives available to manufacturers in choosing shoe machines must be examined initially machine operation by machine operation (A. 44).

2. Since the decree, the number of competing offerings of non-United equipment has expanded to such an extent as to bring about a marked reduction in United's percentage share of total offerings (*ibid.*).

3. The response to the removal of artificial barriers to entry in the form of new offerings for particular machine operations, in the form of new companies domestic and foreign entering the industry, and in the form of older companies expanding the range of their offerings, has been prompt, vigorous and at a steadily increasing rate (A. 45).

4. Even though the bulk of United's large number of competitors offer machines for only one or two operations, nevertheless the nature of the industry and the continued existence of such companies attest to the viability of such competitors (*ibid.*).

5. The character of the shoe and shoe machinery industries and the magnitude of the demands for machines for a given operation are such that a large number of competitors per machine operation is not economically feasible (A. 44).

6. The differences in the patterns of number of competitors per machine operation are explained largely by the relative economic attractiveness of these various operations,

and are the expected patterns resulting from competitive forces not inhibited by artificial barriers (A. 45).

7. The new offerings of non-United equipment have been predominantly for the operations whose relative economic attractiveness has been high. United's competitors have tended to avoid the relatively unattractive operations in which United was already offering new machines and second-hand machines were available (*ibid.*).

8. The existence of alternative processes, sub-processes, and operations of shoe-making for any given operation reduces markedly the market power inherent in sole occupancy or occupancy by only a few suppliers of new machines for a particular operation (*ibid.*).

9. The development of a widespread second-hand market for United's machines has enlarged the number of alternative sources of machines open to shoe manufacturers, especially for those operations in which the number of suppliers of new machines is very small (*ibid.*).

10. The significant effect of the decree in altering the competitive situation in the shoe machinery industry and in enlarging substantially the alternative sources of machines open to shoe manufacturers is thus clearly evident (A. 45-46).

In detailing the evidence for these conclusions Dr. Fox noted the vigor of new entries into machine operations since the decree by competitive suppliers (A. 50-51, 55). He characterized as impressive the magnitude and increasing pace of new entries resulting from the decree's removal of artificial restrictions to entry (A. 52). Exhibit D-88 (admitted Tr. 1466) described the number of new entries

in each three-year period since the decree; viz. 24 to 34 to 59 for domestic machines, or for domestic and foreign machines combined from 43 to 56 to 90. The number of new companies which made new machine entries in each three-year period increased from 11 to 19 to 26, being a total of 56 new companies since the decree (Ex. D-88 Table 7). These new entries reflected a natural response to economic factors, as shown by the high proportion coming into operations which are relatively attractive to competition (A. 53). In Dr. Fox's opinion the pattern of new entries and the expansion of offerings of earlier entrants attest to the vigor of the response to the removal of artificial barriers to entry, and make clear the changed competitive environment of the industry today as compared to ten or fifteen years ago (A. 55). There are now alternative sources of machines for all but a few shoe-making operations and those are operations with the least incentive to competition and little demand, frequently because most shoes are being made by other operations (A. 61-62).

Dr. Fox testified that the relationships observed between relative market attractiveness and the number of shoe machinery competitors support the inference that artificial barriers are now absent and that realistic competition exists (A. 58, 60). Considering the alternatives available for a particular machine operation and also the alternative operations, sub-processes, and methods of shoe-making which increase the number of offerings from which shoe-makers can select machines, Dr. Fox concluded that "the concern for the possible market power inherent in being the sole supplier of new machines for an operation practically disappears" (A. 62). The demand for machines for most shoe-making operations is small. These operations could not possibly support a large number of suppliers. For about 78% of the various operations, the annual requirement (from all

sources) for machine shipments is less than 50 machines; and for about one-third of the operations, less than six new machines per year (A. 47). In one-half of United's models five machines or less are shipped annually (Ex. D-122, admitted Tr. 2154). The consequence is thus bound to be either a very small number of wide-line companies, or a sizable number of companies with narrow lines, or some combination of the two (A. 63). The effect of breaking United into parts might well be, in Dr. Fox's opinion, to drive other competitors out of the market (A. 70-71). He summarized by saying that his conclusions

> "show the significant effect of the provisions of the decree in altering the nature and extent of competition in the shoe machinery industry and in enlarging substantially the alternative sources of machines open to shoe manufacturers. And the nature of the trends which are evident suggest that the competition which United will face, in the future, will be stronger than at the end of 1964." (A. 66)

SUMMARY OF ARGUMENT

I

The relief provided by the 1953 decree, which was affirmed in 347 US 521 at the Government's request, identified all United's exclusionary practices which an exhaustive examination of the shoe machinery industry found to exist, and in addition to eliminating them added further measures to open up the market. The findings of the district court in reviewing the operation of the decree as of January 1 1965, which are not attacked by the Government, show the elimination of all restrictive practices, the freeing up of the market, and the entry of new competitors

and new machine offerings in increasing number. The influx of competition is illustrated by the massive reduction in United's leased machines outstanding, the doubling of revenues by United's principal competitors, the steadily diminishing shipment share of United, the displacement of older machine types by more recent innovations bringing in the techniques of competitors, the creation of a substantial second-hand market, the established freedom of choice of shoe manufacturers in the selection of machinery and alternative shoe-making processes. This situation reflects the steady dissipation of monopoly power, within the meaning of the statute and the decisions, and steady progress "in establishing workable competition" as the decree intended. The resultant situation is one of continuous movement in the shoe machinery as well as the shoe-making industry with a steady trend toward the reduction of United's market share.

The Government contends that a reduction of United's market share to 62% as of 1963 does not constitute sufficient progress in "establishing workable competition" and that more drastic relief is now required. The Government overlooks the continuing forces of change brought about by the decree, in ever-increasing measure. Furthermore the argument fixes on only one of the numerous ways to measure market share. A more illuminating measure is United's share of current new shoe machine business, as measured by the shipment of new machines from the plants of United and its competitors. United's share of total value from current shipments had declined to 48.6% of the total market by 1963. Of the machines entering the plants of shoe manufacturers in an 18-month period during 1963 and 1964, only 37% were purchased or leased directly from United, and only an additional 6.8% were United machines purchased or leased from others. 56.2% were machines of competitive

manufacture. These figures, all found by the trial court, measure United's current market share and its future trend more significantly than the 62% figure mentioned in the court's opinion—a figure that takes into account the revenues of United and its competitors from machines installed in shoe manufacturing plants many years before. Three-fourths of the shoe machines of United origin still in plants in United States shoe factories in 1963 had been shipped before 1955.

II

The district court's denial of the Government's petition for modification did not, as the Government contends, rest upon a misinterpretation and misapplication of the *Swift* doctrine. It is immaterial whether or not the district court correctly interpreted *Swift* as limiting its powers to grant further relief under the C-Day section of the decree in the case at bar. The predicate for further relief under the express terms of that section is a showing that over the ten-year period since it was entered the decree was not achieving its intended effect. In the case at bar, the district court's 16 findings fully support its conclusion that the 1953 decree has operated and is continuing to operate "in establishing workable competition" just as that decree intended. Accordingly, the predicate for further relief never came into existence. Unless the district court committed reversible error in concluding that the 1953 decree is operating as intended to create workable competition, the rule of *Swift* is not brought into question. Correct analysis of the district court's findings and conclusions discloses no reversible error on this issue.

Moreover, the district court correctly interpreted *Swift* to apply to litigated decrees as well as to consent decrees and

to modifications sought by the Government, as well as to modifications sought by defendants. The limitation of the *Swift* rule sought by the Government herein (to apply only to consent decrees and only to modifications sought by defendants) would constitute an unjust discrimination between the parties, would impair finality in litigation, and would unjustifiably burden this Court with reiterated appeals.

ARGUMENT

I. On the undisputed findings the adverse effects of monopolization have been removed and the decree is accomplishing its purpose in "establishing workable competition" by opening the market to the entry of competition on a scale continually increasing.

The remedies which the court in 1953 adopted as the alternative to dissolution were framed deliberately to create a second-hand market, purge the leases of restrictive features, and encourage competition by steadily weakening United's relationships with its customers (110 F. Supp. at 349-50). A sales alternative to the leases was created for the express purpose of dissipating United's monopoly power (*ibid.*). Upon United's appeal to this Court the Government, notwithstanding the denial of dissolution, sought and obtained approval by this Court of the decree so framed.

The question now before the Court is whether the trial judge properly decided that the several remedies contained in the decree were having their intended effect "in establishing workable competition" in the common-sense meaning of the words, viz. competition that works. We submit that those remedies were having and will continue to have that intended effect.

The monopoly power which the court found to exist in 1953 has now been dissipated. The careful findings of the district judge uniquely experienced from the 1953 proceeding in the nature and requirements of the shoe machinery industry, leave no room for doubt as to the effectiveness of the decree. These findings, 266 F. Supp. at 331-4, A. 76-81, are summarized at pp. 7-12 above.

The findings illuminate the factors of mobility and the new competitive forces which have been brought into play by the various decretal provisions. Continuing changes in shoe-making technology have displaced the older techniques employing the standard United types of machine. While in 1950 55% of sole-attaching was done by the seven older processes, this proportion had declined to 42% in 1955, and in 1963 to 33⅓%, which becomes 28% when the newly developed direct mold vulcanizing and injection molding processes are included[5] (Ex. D-13 admitted Tr. 1280-1, D-14 admitted Tr. 1278-9, D-14A admitted Tr. 1279-80). Testimony on the subject was given by James H. Cheek, Assistant Vice President of Genesco Inc., President of its Manufacturing Division, and a member of the Technical Committee of the National Footwear Manufacturers Association. He said that the original large volume welt production for women (both Goodyear and cement) was now practically extinct (Tr. 1378-9); that his company Genesco Inc. had stopped manufacture of shoes by the McKay process and the nail process (Tr. 1356-7); and that cement sole-attaching, direct mold vulcanizing and injection molding are replacing outsole laying, loose-nailing and slugging

[5]The district court found that the "market now includes machines for the manufacture of vulcanized rubber because such machines are competitive with injection moulding machines and other shoe machinery, are used in conventional shoe factories, and are used for both leather-upper and fabric-upper footwear." (266 F. Supp. at 331, A. 76)

operations, and the comparable operations of other processes (Tr. 1380-1). The same trend is attested by numerous other witnesses (e.g. Ex. D-24, D-25, D-30). The consequence has been to displace United machinery of the traditional types current in 1953.

Concrete illustration of the post-decree competitive forces in the shoe machinery field emerges from the record in a treble damage case brought by United's competitor International Shoe Machine Corporation in December 1956 on the basis of the decree. *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.* 315 F. 2d 449 (CA 1 1963), cert. den. 375 US 820. Contrasting the shoe machinery field with which Judge Wyzanski dealt in the Government case, the First Circuit Court of Appeals said (315 F. 2d at 458):

> "In at least one significant facet, this was not the same 'context' which existed in the shoe machinery industry—and specifically in the specialized market of side and toe lasting machinery at issue here—during the instant limitations period. Two of plaintiff's [International Shoe Machine Corp.] three major pieces of equipment were commercially introduced into the market after the close of the evidence in the Government case. One of these machines apparently embodied a technological breakthrough which produced spectacular commercial success for plaintiff; with a demand which far outstripped supply and which strained plaintiff's productive capacity to the utmost. This machine was apparently a highly coveted item in many segments of the industry and its availability was a competitive factor which was missing from the 'context' of the side and toe lasting market in the Government case.

> . . . The machines which plaintiff introduced into the post-1951 market were assuredly pertinent factors in any assessment of the context of the competitive environment and structure within the relevant market for side and toe lasting machinery."

An analysis of United's machine inventory in the 18 major machine types with the new categories of direct mold vulcanizing and injection molding added, was received in evidence as Ex. D-127 (admitted Tr. 2265), and shows the movement of the 20 types from March 1 1955 to March 1 1965, with the numbers on lease, the total shipments in the period, the totals returned in the period, the net shipments resulting, and the total machine sales (used and new) in the period. This exhibit is summarized in three tables, made attachments to this brief, and classified by the types adopted before 1955 (Table A), the types adopted in or after 1955 (Table B), and a consolidated table for all types irrespective of the date of adoption (Table C).

The 54,329 United machines in the major categories which were on lease March 1 1955 had been reduced by March 1 1965 to 15,057 (including 42 machines of the new injection molding type). 31,750 machines had been sold. While 22,615 machines of the principal categories were shipped in the ten-year period, 30,137 in these same categories were returned by customers in the same period, so that the net returns of machines numbered 7,522, and the net diminution of machines outstanding on lease was 39,272.

These figures illustrate the district court's finding that "by 1963 United was not in fact exercising, and indeed was incapable of exercising, exclusionary power over the entire market" (266 F. Supp. at 333, A. 79). Free movement in the shipment, return, and alternating use of the various machine types had been established. The outstanding United machines of the 18 principal categories which were on lease in 1955 had been reduced in number by more

than two-thirds. Three-fifths of the originally leased machines in the major categories had been sold, thus removed from United's control, and established as potential competition to United's new production. Such was customers' freedom to return United machines that returns exceed shipments by one-third, these returns being accounted for in part by the new processes and machines superseding the old processes and machines. New machine types had entered the market in the form of the direct mold vulcanizing and injection molding machines.[6] The picture is thus one of great fluidity corresponding to the demonstrated freedom of choice enjoyed by shoe manufacturers.

The Government contention (br. 26) concerning United's "monopoly or near-monopoly position in the shoe machinery market" mistakenly rests on an asserted market position, recorded five years ago and called that which "United presently controls"—a kind of snapshot view which does not do justice to a moving picture.

The Government brief overlooks not only the movement introduced by the operation of the decree in the shoe machinery market, but the indefinite continuance of that movement in the process of erosion. This is an outstanding feature of the situation created by the decree. It is demonstrated not only by the excess of returns over shipments in each year of the ten-year period (Ex. D-133 admitted Tr. 2264) but also by the survey which United made of

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[6]As to injection molding, the Government distorts the record in asserting that United's sample (disclosing three machines) shows that it accounts for 100% of such machines used in this country (br. 11 n. 6). The Government's own exhibit shows that United's competitor Compo accounted for 68 shipments of such machines (Ex. P-26, admitted Tr. 83), in 1962-64 as against United's shipments of 28 machines (Ex. D-122, admitted Tr. 2154). Those figures highlight the impact of new competition on the market, for by the Government's own admission injection molding is "a new process of great commercial significance which substantially developed after entry of the original decree" (br. 11 n. 6).

shoe machines in place in 1963 and its updating to October 1 1964 (Ex. D-21 admitted Tr. 718, D-60 admitted Tr. 830). This survey was in the form of a random stratified sample, taken with expert statistical advice and accepted by the district court as being "clearly better" than those used in the original case (Tr. 636).

The first count embraced 11,854 machines, the updating took in 11,862 machines. Analysis of the sample by manufacturing origin of the machines in 47 representative factories showed that in the spring of 1963 only 15.3% of the machines counted were on lease from United, while in October 1964 this number had dropped to 13.4%. At the former date 31.2% in the sample had been purchased from United but were now owned by the factories, and at the latter date this percentage had fallen to 30.6%. In the spring of 1963 47.5% of the machines in place in the representative factories were made by competitors of United, while in October 1964 this percentage had increased to 49.7%. Separate analysis of the movement of machinery in the 47 sample factories during the 18 months' study shows that a far greater number of competitive machines entered those factories than United machines. Counted by source of manufacture, the figures are given in Stipulation No. 3 (par. 8, Tr. 823):

	Machines of USMC Manufacture	Machines Manufactured by Others	Total Shoe Machines
Machines Entering ..	270	346	616
Machines Leaving ...	256	67	323
Net Change	+ 14	+279	+293

When analyzed by source of acquisition, the same figures show that between the spring of 1963 and October 1964 37% of the machines taken on by the 47 sample factories were machines of United manufacture purchased or leased from United, 6.8% were machines of United manufacture

purchased or leased from others, and 56.2% were machines of competitive manufacture (Stipulation No. 3 par. 9, Tr. 832-3).

Under the carefully detailed provisions of the decree, with their impact unlimited in time, this process is bound to be a continuing one. It will operate for the indefinite future. The Government's description of the present market position, not only inaccurate in itself, also errs in calling it "an unsatisfactory result 10 years after an adjudication of monopolization" (Govt. br. 26). Any such description wholly overlooks the direction and permanence of the powerful forces set in motion by the decree.

Those trends are bound to continue: shares of current machine shipments are better than machine population figures as measures of current competitive success in placing machines in shoe factories. Because such share figures for United—whether measured in numbers of machines or values of machines—are well below population measures, population shares will inevitably decline further. Continuance of the decline is also assured by the trend and pace of new machine offerings and new entrants, the established second-hand market with more United machines available to second-hand dealers, the decrease in the importance of the older processes when confronted with newly-developed processes, and the fact that United is not now capable of exercising exclusionary power over the market.

The fallacy of the Government's position is demonstrable from several points of view. The Government apparently sees a need for further remedial measures even though it concedes United's present market share may not justify a new proceeding under the Sherman Act. The Government says (br. 26):

> "Whether United could presently be found to possess monopoly power or not in a new proceeding is inconsequential."

We submit on the contrary that it is of the greatest consequence on the question of terminating a proceeding now 20 years old, to realize that the continuing decline in United's market occupancy has already reached a share no longer subject to Sherman Act stricture, and is moving still lower.[7]

On the question of United's market occupancy as of 1963 the Government brief shows profound misunderstanding. This brief says the district court's "most significant finding" is that United "presently controls between three-fifths and two-thirds of the shoe machinery market and receives 62.2% of total industry revenues" (Govt. br. 26 citing 266 F. Supp. at 331). The Government asserts that these percentages indicate "the retention of substantial market power".[8] The fact of the matter is that the figure not only leaves out the continuing movement downward, but does not reflect current market power at all.

The 62% figure, while based on 1963 comparative revenues, took into account current lease income derived from

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[7]Even as of 1963, the undisputed findings reveal a market share for United which, however regarded, falls below the level set for criticism in *United States* v. *Aluminum Company* 148 F. 2d 416, 424 (CA 2 1945) and *United States* v. *Grinnell Corporation* 236 F. Supp. 244 (D. R. I. 1964), aff'd 384 US 563.

[8]While the Government has substantially accepted the findings below and in its brief of January 1968 (served in page proof) no reference is made to unit machine counts marked in evidence as Ex. P-52 and P-53, we note that the Government has designated these exhibits in the joint appendix. If utilized for the first time by the Government in a reply brief, we shall under Rule 41 have no opportunity to deal with them. We regard Ex. P-52 and P-53 as extremely misleading not only because bare machine counts are not significant in the present market (owing to the extreme age of many of them) but because the last four columns of the exhibits have been improperly edited through testimony offered by the witness Lionel Epstein. Without elaborating the point in this brief (since no argument has yet been made on these exhibits) we take the precaution of attaching as Appendix 2 pages 5-14 of our reply brief in the district court dated 20 March 1967.

past transactions. It was not limited to revenue *from 1963 shipments alone*. A vitally important index of market occupancy is the comparison of the values of current shipments of United and of its competitors in 1963, the latest year for which data were available at the time of the hearings. This comparison is not mentioned in the Government brief. Yet the record shows, on balancing the total sale value of United's 1963 shipments against the sale value of such competitors as had figures available (thus a distortion against United), that United's share was only 48.6% in 1963. The following tabulation summarizes the exhibits in evidence on that point:[9]

Sale value of shipments of	1963	Percentage
United	$13,683,660	48.6
Compo, ISMC and W. J. Young	7,137,754	
Other Competitors	7,319,690	51.4
	$28,141,104	100.0

This computation was based on the sale value of all shipments made by United, Compo, International Shoe Machine Corp. and W. J. Young. The value figure of $7,319,690 reflected the sales only of other competitors involved, and unavoidably omitted the sale value of lease shipments which were not susceptible of conversion into a comparable sale figure for 1963. The translation of the lease shipments

[9]Compo figures (Ex. P-36 [admitted Tr. 142], P-243 [admitted Tr. 477], D-107 [admitted Tr. 1848]); International Shoe Machine Corp. figures (Ex. D-103 [admitted Tr. 1810], D-105 [admitted Tr. 1822], P-158 [admitted Tr. 268-75, 351]); W. J. Young figures (Ex. D-111 [admitted Tr. 1931]); the figures for other competitors (Ex. P-69 [admitted Tr. 539], P-71 [admitted Tr. 546] and P-72 [admitted Tr. 551]).

of these competitors into a sale value figure would reduce United's percentage below 48.6%.

Attached to this brief as Table D is a compilation from the records of United, the records of competitors in so far as available, and the testimony of witnesses in open court, which compares shoe machinery revenues of 12 competitor companies and of United on an annual basis for the nine years 1955-63. (These 12 are only a portion of the non-United competitive forces [cf. Ex. P-69, A. 24; Ex. P-70, A. 26; Ex. P-71, A. 27; Ex. P-72, A. 28], being confined to companies with a reasonably good system of records whose representatives testified in open court.) While information from certain competitors in earlier years was sometimes lacking, the total picture is one of steady growth for those companies, both absolutely and by comparison with the decline of the United shoe machinery revenues.

Facts of this nature expose the fallacy of the Government's preoccupation with historical rather than current market share, for that obsession drives the Government into ignoring the central significance of Dr. Fox's testimony and the court's analysis: that competitive developments in the shoe machinery industry during the post-decree decade must be evaluated in the context of the market for shoe machinery. Salient features of that market are: it is a capital goods industry with a long-lived, durable product, whose demand is derived from the shoe industry; in the shoe industry the number of companies and the number of establishments have declined over the past ten years, and total shoe production has not kept pace with population; a relatively small number of the 187 machine operations would attract new competition under conditions of a wholly free market because so few machines are required to satisfy the entire demand for many of the operations; markets which are so limited do not exercise a strong attraction to new competi-

tive entry. Taking account of these and other characteristics, the erosion of population share figures in the post-decree decade is very great for this type of industry.

In stressing that each of United's competitors offers machines in relatively few operations (Govt. br. 27), the Government misses two vitally important points: *First,* a company does not need a broad line to compete effectively in one or a few machine operations, where the machine acquisition decisions are made. *Second,* because of the importance of technological developments and the attendant cost and time required in machine design to compete in any machine operation, the likelihood of many companies making more than a few such technological developments in a ten-year period is small. The apparent expectations of the Government in this respect are naive and unrealistic.

Moreover, the Government misapprehends the realities of the industry when it seeks to exploit the circumstance that in 45 of the machine operations United is the sole supplier (Govt. br. 28). The evidence clearly showed that there are now few shoe-making operations for which there are not at least some alternate sources of machines (A. 62), and these are operations with the least incentive to competition and little demand, frequently because shoes are being made by alternative operations (A. 61) as instanced below.[10] See the district court's Finding 15 set forth at p. 9 above.

The Government again misunderstands the realities in contending that the supply of United machines available for the second-hand market has been continually declining since 1955 (br. 27). The fact is that through sales and conversion sales the number of United machines owned by

[10]Exceptional cases are explained by circumstances such as the recent appearance of the operation, patent protection, market saturation, extremely complicated engineering and manufacture, or widely fluctuating demand (Tr. 1938-48, 1953-4, 1958, 1964, 1966, 1968-9).

customers is continually growing and therefore the competition from this expanding stock of machines for the second-hand market is bound to increase.

Furthermore all the elements of monopolization which the court on the most searching inquiry found to exist, have now been eliminated according to the uncontested findings after a careful review of experience under the decree. It remains true that United has not received monopoly profits (110 F. Supp. at 325); has been free from predatory practices (*id.* at 345); and has manifested the skill and efficiency which normally entitle an entrepreneur to prevail in competition (*id.* at 344; 266 F. Supp. at 334, A. 81).

That portion of the district court's decision which refers to the competition as among the 18 sub-classifications of major machines and suggests the interaction of shoe-making processes (Finding 11), was based upon a large amount of evidence as to the effect on the shoe machinery market of post-decree innovations in shoe technology. The various new processes relying on newer chemical operations that use cements for fastening of all types and various methods of molding, as described in the evidence of the shoe manufacturers (e.g. Ex. D-40 admitted Tr. 609), were depicted in charts of shoe production (Ex. D-54 admitted Tr. 1270) keyed to specific machine or hand operations described on the charts. The charts portrayed as of December 1964 the alternative flows of shoe production through each stage of manufacture, thus providing a picture of the multifarious functions in shoe-making and the divers choices open to the shoe manufacturer among the 187 operations (Fox A. 39). The testimony of Richard A. Unger illustrating the flow of manufacture demonstrated the various ways of lasting a flat-lasted shoe and the several choices open, step by step, between the conventional lasting methods and the autoclave method, or as to fastening the insole, again in assembling the shoe to the last, and so on through all the stages of manufacture. (The description of certain alter-

natives on the basis of two sample shoes as given by Mr. Unger at Tr. 1259-69, is reproduced in Appendix 1 to this brief, by way of illustration of the options that cause machine types to compete against each other.) This profusion of alternatives growing out of the new techniques and enhanced by the volatile demands of fashion, has brought into the market internal factors of competition which were scarcely present in the 1953 picture and which further reduce the importance of machine population counts.

In conjunction with the advent of new constructions utilizing simpler machine types of recent creation, is the fact that the number of machine types and models offered by United has steadily diminished. At the filing of its answer dated May 27 1948 to the Government's complaint, this number stood at 342. By March 1 1955 it had been reduced to 254 (Ex. D-15), 88 models having been withdrawn. By December 31 1963, 149 additional models of those actively offered March 1 1955 had been also withdrawn (Ex. D-15, D-17; O'Neil Tr. 963-4). The 115 types described by the district court (Finding 10, 266 F. Supp. at 332, A. 78), together with 24 types on application, include recent new offerings by United.

Finally, the Government's view of the evidence completely overlooks an important factor peculiar to this case, viz. the longevity of the United machines. The sample taken by United of machines in place in the 47 representative factories in 1963 shows that 75% of all the machines manufactured by United, whether or not owned by it in 1963, had been shipped before 1955 (Ex. D-16 admitted Tr. 1966). Thus three-quarters of the shoe machines which on a population basis the Government would include in its mechanical assessment of United's power in the 1963 market, were already in the market on the effective date of the 1953 decree. The great bulk of them left United ownership long ago, pursuant to the Plan for Terminating Form A Leases which paragraph 9 of that decree commanded (110 F. Supp.

at 353). The splitting of United's shoe machinery business into two or three parts would not affect the ownership by shoemakers of those machines, which are still working in the manufacture of shoes.

The doctrinaire character of the Government's attack is nowhere more obvious than in the claim (br. 28) that the competitive situation in the shoe machinery industry "is in many ways similar to the liquid bleach industry" involved in *Federal Trade Commission* v. *Procter & Gamble Co.* 386 US 568, 571. From any realistic standpoint, the characteristics of the two industries are poles apart. In contrast to the highly diversified nature of the shoe industry, with its 187 different operations and the wide variety of alternatives available to sophisticated industrial buyers purchasing for their particular needs, the liquid bleach industry sells a chemically identical, low-cost, high-turnover consumer product (386 US at 571). Advertising and an efficient distribution system are vital competitive weapons in successful consumer marketing; the increased advertising and distribution advantages to Clorox from its union with Procter & Gamble gave a significant competitive edge to the Clorox product and raised barriers to new entry. Advertising and a distribution system are irrelevant in the shoe machinery industry. The progressive lowering of barriers in the case at bar is proven beyond doubt by the steadily increasing numbers of post-decree competitors, new entrants into the industry, and new machine offerings (p. 17 above). The suggestion that the two industries are "in many ways similar" affronts the realities of a heterogeneous machinery industry as compared with a homogeneous light consumer industry. It also ignores the competitive dynamics of the shoe machinery industry set in motion by the court's decree.[11]

[11] A similar attempt to analogize *Clorox* was recently rejected in *Butler Aviation Co.* v. *CAB*, 1968 Trade Cas. ¶ 72,354 (CA 2 January 31 1968). There the court observed that unlike the "identical liquid bleaches" in *Clorox*, the machines in the case at hand (executive jet planes) vary substantially in characteristics and price—variations also present in shoe machines.

Equally weak is the Government's claim that barriers to new entry into the shoe machinery industry continue to be great, and that most of the barriers present in 1953 are still present to a significant degree (Govt. br. 29-30). The claim conflicts with the plain findings that by 1963 United was incapable of exercising exclusionary power over the entire market; that the unattractive rates of return in some shoe machinery lines tend to discourage full-line entries; and that whatever advantages United enjoys are not due to restraints of trade (266 F. Supp. at 333-34, A. 81). Equally important, the primary barriers to competition found in 1953 were United's size, know-how, patents,[12] servicing network, and leasing system—as the Government concedes (br. 4). Of these, the only possible remnants are size and know-how. But size is no longer a barrier, as the above-mentioned findings of the district court make clear. Nor is know-how; indeed, this fanciful view of know-how as an artificial barrier is merely a way of saying that superior skill, foresight and industry (cf. 148 F. 2d at 430) are now to be considered a detriment to competition.

The Government disagrees with these conclusions. But the conclusions are essentially conclusions of fact based on testimony of record. They were reached by a judge with unique experience both in factual knowledge and economic analysis of the shoe machinery industry. Only the most grievous error in reading the evidence or analyzing its economic significance would justify the substitution of this Court's factual and economic conclusions for those of the judge who has studied the industry so intensively over the past twenty years.

[12]No facts were presented showing exclusion of competition through new patents, despite the Government's unsupported implication to the contrary (br. 51). In its 1953 opinion, the court noted that most of the patents on the fundamental inventions had expired and most existing patents did not technically prevent the accomplishment of the same result in another way. (110 F. Supp. at 333)

The Government urges that under the C-Day provision the test for further relief is whether by 1963 the decree *had succeeded* in establishing workable competition—not, as the trial judge concluded, whether by 1963 the decree had moved at a satisfactory rate "*toward establishing*" workable competition.

As we have shown, the difference is a small and largely academic one, since the trial judge found that by 1963 workable competition had in fact been established in the major shoe machinery lines, that United lacked exclusionary power to prevent workable competition in the remaining minor lines, and that competitive choices were available in other lines which buyers could freely substitute for these minor sole source lines. But in any event, the trial court's reading of its own decree language is plainly a reasonable one; it gives full effect to every word in the disputed clause; it leaves ample room for further relief if the degree of progress had been found inadequate or its rate too slow; and so construed, it is an effective form of relief well within the discretion of a trial court in a monopolization case. Despite the Government's protestations to the contrary, any lawyer reading this clause when the decree issued would realize that it was open to the interpretation now placed upon it. Yet the Government was content with the decree when it was issued in 1953. The Solicitor General vigorously defended it against United's appeal to this Court and elected not to cross-appeal. His present attack can hardly be squared with his predecessor's 1953 praise for "the logic, the clarity and the meticulousness of the opinion on remedy, and of the decree itself."

The cases cited by the Government (br. 21-24) for the proposition that a decree following a finding of monopolization must direct the immediate restoration of competition, by drastic structural means if necessary, dealt with factual sit-

uations widely different from that under review. Those cases uniformly involved deliberate acquisition and extension of monopoly power by combinations of competitors and restraints of trade; Judge Wyzanski, by contrast, found that United's conduct had been "honestly industrial", 110 F. Supp. at 344, and that "it would be anomalous to charge the officers of United with any moral deficiency". 110 F. Supp. at 348. Moreover, the cases cited by the Government which decreed divestiture were cases in which the businesses divested were acquired as part of a program of monopolization, e.g. *United States* v. *Grinnell Corp.* 384 US 563, or in which divestiture was necessary to break affiliations which facilitated conspiracies in restraint of trade. E.g. *International Boxing Club of New York, Inc.* v. *United States* 358 US 242, 255-59; see also *United States* v. *Crescent Amusement Co.* 323 US 173, 188-90. Where neither of these obvious justifications for divestiture is present, as is the case here, divestiture is not presumptively appropriate. In so ruling in 1953, Judge Wyzanski was following the admonition of this Court in another such case, *United States* v. *National Lead Co.* 332 US 319, 353:

> "To separate the operating units of going concerns without more supporting evidence than has been presented here to establish either the need for, or the feasibility of, such a separation would amount to an abuse of discretion."[13]

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[13]The only somewhat similar situation, comparable although less favorable on its facts to the defendant concerned, came before this Court in *United States* v. *International Harvester Co.* 274 US 693 (1927). This also was an attempt to modify an existing decree and obtain dissolution of the company, which had been held upon trial to have a more than 85% market share, 214 Fed. 987. On the petition for further relief, a reduction of market share was shown, and this Court found competitive conditions had been established (274 US at 704, 709). Dismissal of the Government's petition for modification was affirmed. The case at bar as represented by the

In this context it is of interest that John M. Clark, originator of the phrase "workable competition", has now re-set it in terms that he calls dynamic tools of analysis. See "Competition as a Dynamic Process", Brookings Institution 1961 (Preface p. ix)[14]. The analytical features of this study bear comparison with the evidence of Professor Fox in this record and with the conclusions of the district court.

In his new book Professor Clark expressly shifts the emphasis from "workable" to "effective" competition because, as he says (Preface p. ix):

> ". . . 'workable' stresses mere feasibility and is consistent with the verdict that feasible forms of competition, while tolerable, are still inferior substitutes for that 'pure and perfect' competition which has been so widely accepted as a normative ideal. And I have become increasingly impressed that the kind of competition we have, with all of its defects—and these are serious—is better than the 'pure and perfect' norm, because it makes for progress. Some departures from 'pure and perfect' competition are not only inseparable from progress, but necessary to it. *The theory of effective competition is dynamic theory.*" (Emphasis supplied)

Clark's new work is devoted to a consideration of the dynamic elements in competition as to which he says (p. x):

> "Of the essence of the picture are innovations and their diffusion, and competition in products and sales promotion, as well as in prices."

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findings of the district court shows a much sharper, more definite, and continuing reduction of market share together with the entry of new competitive forces.

[14]The advisory committee assembled by The Brookings Institution for Mr. Clark's study consisted of the well-known economists Corwin D. Edwards, Richard B. Heflebower, A. D. H. Kaplan, and Mark S. Massel (p. vii).

In his concluding appraisal he summarizes the elements of effective (workable) competition as follows (p. 487):

> "As to the forces tending to the maintenance of effective competition, the outstanding ones include, first, the freedom of any individual, by himself or by forming an organization, to engage in any trade or industry; second, access to the necessary means of production, including funds, material resources, and technical knowledge; and third, a climate in which participants in an industry can and do maintain independence of attitude and policy, and in which there are enough independent firms to afford opportunities of substantial increase in the market share of any who compete successfully, and enough to create an inherent probability that there will be some among them whose situation and temperament lead them to initiate competitive action, thus breaking up any tendency for the market to settle into a passive condition of mutual defensiveness."

We submit that this is a fair theoretical description of the elements of movement, change over time, ease of entry, and competitive endeavor which are exemplified in the present record. It points up the dynamics of effective (workable) competition—the market dynamics which Dr. Fox has so carefully considered in terms of this record and against the background of the trial court's original findings (pp. 13-8 above).

II. The trial court did not apply an erroneous standard in refusing to modify its decree.

On the findings and evidence summarized above, we submit it is clear that the further remedies sought by the Government were rightly refused. If so, neither the inter-

pretation of par. 18's provision for possible re-examination of the decree nor the application of the rule of *United States* v. *Swift & Co.* 286 US 106, 119 that an injunction

> "is not subject to impeachment in its application to the conditions that existed at its making"

is drawn into question. While Judge Wyzanski concluded that his power to alter the decree was limited by the *Swift* rule and was not broadened by par. 18 (266 F. Supp. at 329-30, A. 73-74), any error in this conclusion would be immaterial, if error there were, by reason of the correctness of his basic holding that the decree is having its intended effect in establishing workable competition, and that the predicate for further relief under par. 18 had not been established.

In principle however we submit that the Government's effort to escape from the *Swift* rule or to construe par. 18 as modifying it is not entitled to succeed.

A. Paragraph 18 did not contemplate resort to drastic structural relief if the decree was working as intended.

The Government argues that the "plain meaning" of par. 18 (br. 42) was that if upon re-examination the decree had not fully restored "workable competition" it was to be recast with "a presumption in favor of remedies designed to change the structure of the industry—i.e., some form of divestiture" (br. 48). On the contrary, as its author Judge Wyzanski held, it is clear that par. 18 did not contemplate that the decree was to be altered if it was working as anticipated. It is especially clear that in these circumstances it did not contemplate drastic structural relief.

Judge Wyzanski in his original Opinion on Remedy after careful consideration rejected the Government's demand that United be dissolved into three manufacturing

companies, 110 F. Supp. at 348, despite the Government's contention that injunctive relief would leave "the basic monopoly of United . . . untouched and unimpaired." Brief for the United States on Relief, p. 37. Judge Wyzanski did not state that he was withholding dissolution "until milder remedies have been tried," as he did when discussing the possibility of prohibiting leasing altogether, 110 F. Supp. at 349, or as he did when leaving United flexibility in setting the comparative terms of lease and sale, *id.* at 351. He rejected dissolution outright.[15] The Government neither argued to Judge Wyzanski that if he refused dissolution he should leave the possibility open for the future nor intimated to this Court that he had done so. If the Government had suggested to this Court that Judge Wyzanski's rejection of dissolution was merely tentative, not only would the decree have been non-appealable, *Brown Shoe Co., Inc.* v. *United States* 370 US 294, 306-11, but far graver questions of the sufficiency of the evidence to support the decree would have been presented.

Where the Government has wished in antitrust decrees to provide that the advisability of divestiture should be re-examined *de novo* at some future time, it has known how to say so in terms which left no doubt. E.g., *United States v. International Harvester Co.* 274 US 693, 697; Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?*, 68 Yale L. J. 1391, 1396 n. 22 (1959). It never sought to have par. 18 say so; and it should not be permitted now to override the consistent understanding of the parties and the judge who framed par. 18 that it did not say so. Cf. *United States* v. *Atlantic Ref. Co.* 360 US 19.

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[15]The Government at br. 24-25 gives an erroneous impression that the mention of "milder remedies" was directed to the possibility of dissolution; this is incorrect.

B. The decree may not be modified in the absence of material and unforeseen changes in the conditions that existed when it was drawn.

The Government contends that the structural relief it seeks "could have been imposed in the original decree" (br. 40), so that "neither *Swift* nor any other precedent requires the restrictive approach to modification of antitrust decrees adopted by the district court" (br. 41). In fact, the Government sought dissolution at the original trial, arguing then as now that injunctive relief alone is inadequate, and the district court rejected dissolution as impracticable and unnecessary. This case is therefore governed by the standard enunciated by this Court in *United States* v. *Swift & Co.* 286 US 106, 119:

> "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting."

This Court has often re-affirmed the *Swift* standard. In *System Fed'n No. 91, Ry. Employes' Dep't* v. *Wright* 364 US 642, 647-48, for example, this Court held:

> "There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree *if the circumstances,* whether of law or fact, obtaining at the time of its issuance *have changed, or new ones have since arisen. . . .* A balance must thus be struck between the policies of *res judicata* and the right of the court to apply modified measures to *changed circumstances.*" (Emphasis supplied.)

See also *Dombrowski* v. *Pfister* 380 US 479, 492; *Los Angeles Meat & Provision Drivers Union* v. *United States* 371 US 94, 103 & n. 7; *Donaldson* v. *Read Magazine, Inc.* 333 US 178, 184. The *Swift* standard has consistently been applied by lower Federal courts.[16]

The *Swift* standard is supported by the weighty considerations that underlie *res judicata:* re-litigation of an adjudication upon which the prevailing and third parties have relied is both wasteful and unjust. *System Fed'n No. 91, Ry. Employes' Dep't* v. *Wright* 364 US at 647-8. Relitigation of the issue whether United should be dismembered would be especially unjust after the passage of fifteen years during which United has continued to invest capital and energy in the shoe machinery field in reliance upon Judge Wyzanski's refusal to dissolve it. Even commentators who urge that the *Swift* rule should generally be relaxed recognize that it should be followed where there has been such reliance. See e.g. Note, *Requests by the Government for Modification of Consent Decrees,* 75 Yale L. J. 657, 670 (1966).

Perhaps recognizing this, the Government calls Judge Wyzanski's decree "tentative" and "provisional" (br. 38), and asserts that allowing re-examination *de novo* of the issue of dissolution in cases like this one would "permit a desirable degree of flexibility . . . as to the nature and scope of relief sought initially" (br. 44), even in the absence of material and unforeseen changes in circumstances. But the Government sought no such alternative in this case. Relying upon the sweeping rule later authoritatively formu-

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[16] E.g., *Food Center, Inc.* v. *Food Fair Stores, Inc.* 356 F. 2d 775, 779-80 (CA 1 1966); *Schildhaus* v. *Moe* 335 F. 2d 529 (CA 2 1964) (Friendly, J.); *Bowdil Co.* v. *Central Mine Equip. Co.* 216 F. 2d 156, 159 (CA 8 1954), cert. denied 348 US 936; *Morse-Starrett Prods. Co.* v. *Steccone* 205 F. 2d 244, 248-49 (CA 9 1953); 7 Moore, *Federal Practice* ¶ 60.26[4], at 288 (2d ed. 1966).

lated in *du Pont,* 366 US at 327-31, it pressed for immediate dissolution of United, failed to establish that it was either possible or desirable, and failed to appeal. It should not now be permitted to re-litigate that issue by rewriting the record.[17]

The Government also suggests that *Swift* has been overruled, at least as to petitions for modification by the Government, by *Chrysler Corp.* v. *United States* 316 US 556 and *Hughes* v. *United States* 342 US 353. *Chrysler* holds merely that a decree may be modified in an incidental particular when the party opposing modification can point to no way in which it will be injured by modification. 316 US at 563-64; see Note, *Modification of Antitrust Consent Decrees,* 63 Harv. L. Rev. 320, 325 (1949). Contrast *Ford Motor Co.* v. *United States* 335 US 303, 321-22, where prejudice was clear. United would sustain substantial injury if modification were permitted here. *Hughes* holds only that no modification may be made without a hearing; while the Government argued in that case that *Chrysler* had relaxed the *Swift* standard and excused the failure to hold a hearing, Brief for the United States, pp. 22-29, this Court did not even mention this argument in its opinion. Lower Federal courts have consistently applied the *Swift* standard to motions by the Government for modification. *United States* v. *Radio Corp. of America* 46 F. Supp. 654 (D. Del. 1942), appeal dismissed on motion of United States, 318 US 796; see *United States* v. *Imperial Chem. Indus., Ltd.* 1957 Trade Cas. ¶ 68,859 (SDNY 1957).

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[17]Nor can the Government rely on cases in which provisions of the decree were appealed, and this Court indicated that the points on appeal might be raised again below if circumstances proved the appealing party's apprehensions justified. E.g., *Lorain Journal Co.* v. *United States* 342 US 143, 156-57; *Associated Press* v. *United States* 326 US 1, 22-23.

In essence, the Government is seeking to avoid the application of the *Swift* rule on the ground that it *is* the Government. This approach is particularly inappropriate in a litigated case. It is also a surprising argument in the context of the power of a court of equity to modify its decrees. "For such a court to ignore totally the interests and concerns of a private defendant in favor of the Government would be wholly inconsistent with the spirit of the principles upon which its authority is founded." Note, 75 Yale L. J. 657, 669 n. 60 (1966). The Government here is asking that at its instance only a judicial decree, contrary to the general rule, be made "freely susceptible to unilateral change." See Note, 63 Harv. L. Rev. 320, 322 (1949).

No precedent and no policy support such a radical departure from established principles of jurisprudence. The only case cited by the Government for its unusual proposition, *Virginian Railway Co.* v. *System Fed'n No. 40* 300 US 515, 552, had nothing to do either with modification of a decree or with preferential treatment of one party over another. The Court was there declaring the proposition that a court of equity in framing an original decree in a private dispute should have regard for an applicable statutory "declaration of public interest and policy which should be persuasive" in the court's consideration. *Ibid.* All antitrust decrees granting relief are designed to protect the public interest. There is no more public interest to be served by wasteful re-litigaton of settled matters than there is by employing divestiture where antitrust violations can be corrected by less drastic remedies.

The Government also intimates that *Swift* should not apply because the decree in this case was entered after litigation, not upon consent. But the decree in *Swift* was entered "after years of litigation", 286 US at 119, and the Court rejected the contention that the standard of modification

for consent decrees should differ from that for litigated decrees. 286 US at 115. See also *System Fed'n No. 91, Ry. Employes' Dep't* v. *Wright* 364 US 642, 650-51. The *Swift* rule has consistently been applied to litigated antitrust decrees. E.g., *Adelman* v. *Paramount Pictures, Inc.* 296 F. 2d 308 (CA 5 1961), cert. denied 369 US 851; *United States* v. *Besser Mfg. Co.* 125 F. Supp. 710 (E. D. Mich. 1954). If any distinction is to be made between litigated cases and consent decree cases with regard to the standards applicable to a subsequent petition for modification, a greater showing of need for a change should be required for decrees entered, like the present one, after litigation. Such decrees are normally the result of a much larger investment of money and time by both sides, and of available judicial resources both at trial and on any appeal. Litigated decrees are based upon far greater knowledge of and far sharper focus on the facts regarding not only the antitrust violations but also the industry context in which they take place. Cf. *United States* v. *United States Gypsum Co.* 340 US 76, 87-88. A litigated decree represents an independent and informed evaluation that consent decrees rarely reflect. Because decrees entered after litigation involve far more judicial involvement in the process of producing and reviewing a decree, there should be greater reluctance to interfere with a framework once it is fixed and defined.

The Government's attack on *Swift,* if accepted, would threaten the finality of every antitrust decree to which the Government is a party. Notwithstanding the disavowal (br. 40-41), it would entail precisely that continuing judicial supervision of business conduct which this Court deprecated in *United States* v. *Paramount Pictures, Inc.* 334 US 131, 162-64. It would leave forever pending over each antitrust defendant, whether successful or not in the original ad-

judication, the Damocles sword of renewed litigation, and would impose upon this Court the repeated burden of successive appeals under the Expediting Act. No case would ever be ended.

Looked at in the light in which the Government brief attempts to change the *Swift* rule, that is, in the light of proper practice in antitrust enforcement, the question arises, To what end should such a change be made? The case at bar was filed in 1947, and the Court may well ask what purpose is served by its indefinite prolongation. If a current antitrust violation is claimed to exist, the courts stand open for a new action, however unwarranted it may prove to be upon examination.[18] If on the other hand the facts of recent occurrence do not warrant and would not support an independent suit, as is hinted at Govt. br. 26, how can it possibly be in the public interest to keep litigation alive by adding a *coda* to a litigation already twenty years old?

The fact that, as Judge Wyzanski clearly pointed out, the scope of his ten-year review was foreseen from the beginning and the subsequent development of the industry under the channeling of his decree has fallen into the anticipated pattern, makes all the more inappropriate the present attempt to revive the original prayer for dissolution which lapsed with the expiration of the Government's right of appeal in 1953. As the district court pointed out, the Government's complaint is "not that the decree did not work as expected, but that working in the foreseeable and intended

[18]For the most part, the commentators who urge that the *Swift* rule should be modified would do so when the Government seeks to *litigate the merits* of a case. See, e.g., Turner, *Antitrust Consent Decrees: Some Basic Policy Questions*, 23 N. Y. City Bar Ass'n Record 118, 126 (1968); Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 Harv. L. Rev. 1303, 1324-27 (1967). The reference by Government counsel at Tr. 36 to an increase in price in April 1966, outside the review period, does not justify the reference at Govt. br. 31 n. 14 to "new or continuing restraints of trade".

way the decree did not accomplish what the Government had originally prayed for and what this Court had rejected" (266 F. Supp. at 334, A. 82).

It deserves special emphasis that this is a *continuing* decree, and that the court retains jurisdiction to consider future requests for modification. We do not say that circumstances could not arise in which the Government might be entitled to further relief including divestiture; neither does *Swift*. We urge only, as *Swift* and *Alcoa*, 153 F. Supp. 132, 166 (SDNY 1957) hold, that whenever the Government seeks such relief, it should carry the burden of showing changed conditions that establish the inability of the decree as originally fashioned to accomplish its intended purpose. This is the burden the Government has failed to sustain.

CONCLUSION

The district court's order and decision of April 11 1967 are, in so far as appealed from, the only proper resolution of this long-enduring litigation, and should be affirmed.

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March 11 1968

TABLE A

UNITED'S "MAJOR" MACHINES ADOPTED PRIOR TO 1/1/55

		Machs. on Lease 3/1/55	Machs. Shipped 3/1/55-3/1/65	Machs. Returned 3/1/55-3/1/65	Net Shipments 3/1/55-3/1/65	Total Mach. Sales	Machs. on Lease 3/1/65
1	Clicking	22,553	2,238	5,170	(2,932)	17,459	2,162
2	Eyeletting	2,441	574	673	(99)	1,867	475
3	Cutting Press Dinking	219	61	74	(13)	182	24
4	Pulling Over	2,885	658	1,736	(1,078)	1,248	559
5	Lasting:						
	Side Lasting—Flat	2,244	628	1,847	(1,219)	800	225
	Side Lasting—Welt	1,419	209	603	(394)	801	224
	Stitchdown Lasting	688	197	492	(295)	323	70
	Prewelt Lasting	74	8	50	(42)	8	24
	Toe Lasting—Flat	2,601	999	2,633	(1,634)	823	144
	Toe Lasting—Welt	1,898	286	1,413	(1,127)	594	177
	Heel Seat Lasting	1,563	905	1,000	(95)	666	802
	All	10,487	3,232	8,038	(4,806)	4,015	1,666
6	Welt Sewing	1,210	117	971	(854)	234	122
7	Inseam Trimming	531	103	288	(185)	214	132
8	Outsole Laying	1,092	253	1,061	(808)	117	167
9	Rough Rounding	1,351	321	947	(626)	502	223
10	Stitch Outsoles	4,238	1,166	2,918	(1,752)	1,605	881
11	Cement Sole Attaching	675	594	928	(334)	80	261
12	Littleway Lockstitch Sole Sewing	744	135	643	(508)	190	46
13	McKay Chainstitch Sole Sewing	302	44	224	(180)	108	14
14	Loose Nailing	1,051	135	504	(369)	551	131
15	Outsole Leveling	662	57	466	(409)	212	41
16	Fibre Fastening	441	117	253	(136)	214	91
17	Heel Attaching	2,739	679	1,970	(1,291)	1,001	447
18	Slugging	701	60	329	(269)	385	47
11-A	Direct Molded Vulcanized	—	—	—	—	—	—
11-B	Injection Molding	—	—	—	—	—	—
	Total	54,322	10,544	27,193	(16,649)	30,184	7,489
	Number of Conversion Sales					29,613	
	" " New Machine Sales					571	

TABLE B

UNITED'S "MAJOR" MACHINES ADOPTED 1/1/55 OR LATER

		Machs. on Lease 3/1/55	Machs. Shipped 3/1/55-3/1/65	Machs. Returned 3/1/55-3/1/65	Net Shipments 3/1/55-3/1/65	Total Mach. Sales	Machs. on Lease 3/1/65
1	Clicking	5	4,199	518	3,681	1,085	2,601
2	Eyeletting	—	—	—	—	—	—
3	Cutting Press Dinking	—	—	—	—	—	—
4	Pulling Over	(5)	1,271	300	971	68	898
5	Lasting:						
	Side Lasting—Flat	(1)	1,690	548	1,142	203	938
	Side Lasting—Welt	—	—	—	—	—	—
	Stitchdown Lasting	—	—	—	—	—	—
	Prewelt Lasting	—	—	—	—	—	—
	Toe Lasting—Flat	14	1,945	959	986	13	987
	Toe Lasting—Welt	9	480	54	426	11	424
	Heel Seat Lasting	(2)	161	19	142	19	121
	All	20	4,276	1,580	2,696	246	2,470
6	Welt Sewing	2	521	65	456	39	419
7	Inseam Trimming	—	—	—	—	—	—
8	Outsole Laying	—	—	—	—	—	—
9	Rough Rounding	1	135	20	115	2	114
10	Stitch Outsoles	—	—	—	—	—	—
11	Cement Sole Attaching	(16)	747	305	442	36	390
12	Littleway Lockstitch Sole Sewing	1	448	100	348	29	320
13	McKay Chainstitch Sole Sewing	—	—	—	—	—	—
14	Loose Nailing	—	—	—	—	—	—
15	Outsole Leveling	0	183	26	157	30	127
16	Fibre Fastening	—	—	—	—	—	—
17	Heel Attaching	0	231	13	218	31	187
18	Slugging	—	—	—	—	—	—
11-A	Direct Molded Vulcanized	0	9	9	0	0	0
11-B	Injection Molding	(1)	51	8	43	0	42
	Total	7	12,071	2,944	9,127	1,566	7,568
	Number of Conversion Sales					306	
	" " New Machine Sales					1,260	

Note: The negative figures in the 3/1/55 column are due to the necessity of working backwards from 1964 through various adjustments with three machine records so as to establish a consistent basis for machine activity (Snow Tr. 2288-91).

TABLE C

ALL UNITED'S "MAJOR" MACHINES

		Machs. on Lease 3/1/55	Machs. Shipped 3/1/55-3/1/65	Machs. Returned 3/1/55-3/1/65	Net Shipments 3/1/55-3/1/65	Total Mach. Sales	Machs. on Lease 3/1/65
1	Clicking	22,558	6,437	5,688	740	18,544	4,763
2	Eyeletting	2,441	574	673	(99)	1,867	475
3	Cutting Press Dinking	219	61	74	(13)	182	24
4	Pulling Over	2,880	1,929	2,036	(107)	1,316	1,457
5	Lasting:						
	Side Lasting—Flat	2,243	2,318	2,395	(77)	1,003	1,163
	Side Lasting—Welt	1,419	209	603	(394)	801	224
	Stitchdown Lasting	688	197	492	(295)	323	70
	Prewelt Lasting	74	8	50	(42)	8	24
	Toe Lasting—Flat	2,615	2,944	3,592	(648)	836	1,131
	Toe Lasting—Welt	1,907	766	1,467	(701)	605	601
	Heel Seat Lasting	1,561	1,066	1,019	47	685	923
	All	10,507	7,508	9,618	(2,110)	4,261	4,136
6	Welt Sewing	1,212	638	1,036	(398)	273	541
7	Inseam Trimming	531	103	288	(185)	214	132
8	Outsole Laying	1,092	253	1,061	(808)	117	167
9	Rough Rounding	1,352	456	967	(511)	504	337
10	Stitch Outsoles	4,238	1,166	2,918	(1,752)	1,605	881
11	Cement Sole Attaching	659	1,341	1,233	108	116	651
12	Littleway Lockstitch Sole Sewing	745	583	743	(160)	219	366
13	McKay Chainstitch Sole Sewing	302	44	224	(180)	108	14
14	Loose Nailing	1,051	135	504	(369)	551	131
15	Outsole Leveling	662	240	492	(252)	242	168
16	Fibre Fastening	441	117	253	(136)	214	91
17	Heel Attaching	2,739	910	1,983	(1,073)	1,032	634
18	Slugging	701	60	329	(269)	385	47
11-A	Direct Molded Vulcanized	0	9	9	0	0	0
11-B	Injection Molding	(1)	51	8	43	0	42
	Total	54,329	22,615	30,137	(7,522)	31,750	15,057
	Number of Conversion Sales					29,919	
	" " New Machine Sales					1,831	

Note: The negative figure in the 3/1/55 column is due to the necessity of working backwards from 1964 through various adjustments with three machine records so as to establish a consistent basis for machine activity (Snow Tr. 2288-91).

TABLE D (Referred to at p. 30 above.)

	1955	1956	1957	1958	1959	1960	1961	1962	1963
COMPANY									
1. INTERNATIONAL SHOE									
Lease	$ 982,991	$ 1,175,889	$ 1,460,234	$ 1,738,968	$ 1,918,753	$ 2,382,990	$ 2,954,188	$ 3,294,608	$ 3,609,087
2. COMPO									
Lease	1,406,719	1,437,465	1,448,245	1,381,603	1,406,952	1,428,065	1,578,442	1,577,534	1,563,566
Sale	313,223	363,343	172,315	362,858	381,625	298,744	402,202	1,200,167	1,435,544
3. INDUSTRIAL SHOE									
Sale	(No information in Record)				74,500	154,000	360,000	243,000	189,000
4. SAGEM CORP.									
Sale	43,496	24,400	24,920	48,880	39,040	43,920	39,040	14,640	14,640
5. SCHWABE									
Sale and Lease	392,565	394,477	425,762	438,453	658,755	586,442	591,848	855,804	763,217
6. W. J. YOUNG									
Lease	0	0	0	0	3,720	5,580	9,300	31,620	47,430
Sale	73,225	133,750	62,000	52,725	134,045	208,915	286,575	196,425	181,250
7. LUDLOW ENTERPRISES									
Lease			0	0	0	0	0	0	800
Sale			29,574	107,036	49,484	103,158	170,922	179,091	245,195
8. DIAMOND MACHINE									
Lease	(No information in Record)								
Sale							23,067	45,492	75,493
9. BOSTON MACHINE WORKS									
Lease	135,453	147,375	154,582	185,169	208,155	230,782	252,914	286,867	296,906
Sale	111,578	116,185	138,404	136,981	141,331	146,558	137,488	139,088	151,127
10. FORTUNA									
Lease	(No information in Record)								
Sale	43,125	136,625	142,400	172,125	243,225	206,275	193,950	214,900	131,800
11. PRIME									
Lease	21,104	18,965	30,522	24,278	26,795	22,264	22,927	30,652	52,995
Sale	49,837	82,142	89,122	74,381	96,320	85,542	62,754	65,778	57,098
12. C. I. C.									
Lease			(Not Available)		51,875	36,328	43,708	43,700	16,474
Sale			(Not Available)		118,125	0	0	108,750	11,000
TOTAL	$ 3,573,316	$ 4,030,616	$ 4,178,080	$ 4,723,457	$ 5,552,700	$ 5,939,563	$ 7,129,325	$ 8,528,116	$ 8,842,622
UNITED SHOE (Ex. P-68)									
Lease	$31,566,000	$26,493,000	$25,308,000	$23,907,000	$24,767,000	$23,182,000	$23,051,000	$23,184,000	$22,393,000
New Sales	737,000	1,311,000	793,000	1,269,000	768,000	800,000	1,242,000	1,102,000	1,639,000
TOTAL	$32,303,000	$27,804,000	$26,101,000	$25,176,000	$25,535,000	$23,982,000	$24,293,000	$24,286,000	$24,032,000

SOURCES:

1. Exhibit D-104. No figures available for revenues from sales of new machines 1955-63 (Tr. 1821).
2. Exhibits P-36, P-243, P-69. Includes figures for IVC.
3. Affidavit of Nov. 3 1966. No machines shipped on lease (Tr. 1851).
4. Exhibit D-109. No machines shipped on lease (Tr. 1878).
5. Exhibit P-211. Lease and sale figures are combined (Tr. 1907-8).
6. Exhibit D-111.
7. Exhibit P-176; accountant's statement of Nov. 3 1966. Sales figures are gross revenues; 90% are shoe machinery (Tr. 2010). Organized 1957.
8. Exhibit D-116. Organized 1961.
9. Exhibit P-115.
10. Exhibit D-129; calculated as suggested by Court at Tr. 2130.
11. Exhibits P-193, 194.
12. Letter Charles E. DiPesa & Co. (accountants) to C. I. C. Machinery, Inc., Nov. 18 1966. Entered U. S. market 1957 (Tr. 2189).